Supreme Court, U.S.
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No. 93-1927

In The

Supreme Court of the United States

October Term, 1994

OMNITECH INTERNATIONAL, INC.,

Plaintiff/Petitioner,

v.

THE CLOROX COMPANY,

Defendant/Respondent.

Petition For Writ Of Certiorari To The United States Court of Appeals For The Fifth Circuit

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Contrary to the "Questions Presented for Review" included in the Petition for Writ of Certiorari filed by plaintiff/petitioner Omnitech International, Inc. ("Omnitech"), the question actually presented is whether this Court should exercise its judicial discretion to review this case, where the Fifth Circuit Court of Appeals properly reversed the district court's denial of Clorox's Motion for Judgment as a Matter of Law, based on the fact there was a complete lack of substantial evidence presented by the petitioner at trial to support its claim for unfair trade practices under La. R.S. 51:1409, *et seq.*

PARTIES BELOW

Pursuant to Supreme Court Rule 14.1(b), the names of all parties to the proceeding appear in the caption of the case and are therefore not restated in this Brief in Opposition to the petition for writ of certiorari.

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STATEMENT OF JURISDICTION

The Petition for Writ of Certiorari was filed by Omnitech on May 25, 1994, and was received by counsel for the respondent on May 27, 1994. This Opposition Brief is filed in accordance with Rules 15.2 and 30.4 of the United States Supreme Court Rules and is timely filed as it is filed within the thirty-day extension of time granted by the Clerk of the Supreme Court on June 16, 1994.

Respondent, The Clorox Company ("Clorox"), objects to the petitioner's attempt to invoke this Court's jurisdiction based on the fact that the decision of the Fifth Circuit Court of Appeals was legally correct and that no "special and important reasons" exist for this Court to exercise its judicial discretion.

STATUTORY PROVISIONS INVOLVED

Rule 50(a) of the Federal Rules of Civil Procedure provides:

> (1) If during a trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue, the court may determine the issue against that party and may grant a motion for judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue.
>
> (2) Motions for judgment as a matter of law may be made at any time before submission of the case to the jury. Such a motion shall specify

> the judgment sought and the law and the facts on which the moving party is entitled to the judgment.

Louisiana Revised Statutes Title 51 section 1409(A), cited as the Unfair Trade Practices and Consumer Protection Law, provides:

> Any person who suffers any ascertainable loss of money or movable property, corporeal or incorporeal, as a result of the use or employment by another person of any unfair or deceptive method, act or practice declared unlawful by R.S. 51:1405, may bring an action individually but not in a representative capacity to recover actual damages. If the court finds the unfair or deceptive method, act or practice was knowingly used, after being put on notice by the director or attorney general, the court shall award three times the actual damages sustained. In the event that damages are awarded under this Section, the court shall award to the person bringing such action reasonable attorney's fees and costs. Upon a finding by the court that an action under this section was groundless and brought in bad faith or for purposes of harassment, the court may award to the defendant reasonable attorney's fees and costs.

Rule 10 of the United States Supreme Court states the considerations governing review on a writ of certiorari, and provides, in relevant part:

> .1. A review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only when there are special and important reasons therefor. The following, while neither controlling nor

fully measuring the Court's discretion, indicate the character of reasons that will be considered:

> (a) When a United States court of appeals has rendered a decision in conflict with the decision of another United States court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

I. INTRODUCTION

The same standard governing directed verdicts and judgments notwithstanding the verdict applied by the trial court is applied on appeal. *Hinshaw v. Doffer*, 785 F.2d 1260, 1263 (5th Cir. 1986). As the Fifth Circuit Court of Appeals held in its landmark decision in *Boeing Co. v. Shipman*, 411 F.2d 365, 374-75 (5th Cir. 1969) (en banc), "[i]f the facts and inferences point so strongly and overwhelmingly in favor of one party that the Court believes that reasonable men could not arrive at a contrary verdict, granting of the motions is proper." "[A] judge's decision to grant a directed verdict or a judgment notwithstanding the verdict is not a matter of discretion, *but a conclusion of law based upon a finding that there is insufficient evidence to create a fact question for the jury.*" *In re Letterman Bros. Energy Securities Litigation*, 799 F.2d 967, 972 (5th Cir. 1986), *cert. denied*, 107 S.Ct. 1373 (1987) (emphasis supplied) (citations omitted). Applying this standard to the present case, it is clear that the Fifth

Circuit properly dismissed Omnitech's claim for unfair trade practices, as a matter of law.

In order to recover under the Louisiana Unfair Trade Practices Act ("LUTPA"), Omnitech was required to "prove some element of fraud, misrepresentation, deception or other unethical conduct" by Clorox. *Dufau v. Creole Engineering, Inc.*, 465 So.2d 752, 758 (La. App. 5th Cir.), *writ denied*, 468 So.2d 1207 (La. 1985); *Crabtree Investments, Inc. v. Merrill Lynch, Pierce, Fenner & Smith*, 577 F. Supp. 1466, 1473 (M.D. La. 1984), *aff'd*, 738 F.2d 434 (5th Cir. 1984). A practice or method is "unfair" only when it offends "established" public policy *and* when the practice is "immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers." *Monroe Medical Clinic, Inc. v. Hospital Corp. of America*, 522 So.2d 1362, 1365 (La. App. 2d Cir. 1988). Omnitech was also required to establish that it "suffer[ed] an ascertainable loss of money or movable property" as a result of the alleged unfair trade practice by Clorox. La. R.S. 51:1409(A).

As reflected in its petition for writ of certiorari, Omnitech's entire case against Clorox is based upon its groundless attempts to expand the Louisiana Unfair Trade Practices Act beyond any reasonable intent of the Louisiana legislature and the Louisiana courts, but yet unreasonably limit the authority of the appellate court to review a jury's verdict that was not supported by the evidence at trial.

Under the petitioner's version of the facts and law, a plaintiff who merely asserts without supporting evidence, that a defendant's conduct was somehow "unfair",

could bring and prevail on a claim for unfair trade practices even though the defendant breached no preexisting duties owed to the plaintiff and did not engage in any type of fraudulent or deceptive conduct. Because the Louisiana Unfair Trade Practices Act is "penal in nature", it is "subject to reasonably strict construction." *Morris v. Rental Tools, Inc.*, 435 So.2d 528, 532 (La. App. 5th Cir. 1983). As stated by the Fifth Circuit in dismissing Omnitech's claim for unfair trade practices, "[t]he courts interpreting the LUTPA have been hesitant to impose liability where the evidence reveals merely a normal business relationship." Pet. Appendix A, p. 38. Omnitech's attempt to impose liability on Clorox under an expansive, overbroad interpretation of the LUTPA combined with the complete absence of any supporting evidence, was properly rejected by the Fifth Circuit in this case.

Close review of the relevant authorities results in the conclusion that absent evidence that Clorox was engaged in fraudulent or deceptive conduct, or breached any obligations owed to Omnitech, the Fifth Circuit was correct to dismiss Omnitech's claim for unfair trade practices. In its petition, Omnitech has basically asserted that because the trial court erroneously allowed the case to go to the jury, the Fifth Circuit was therefore precluded from granting Clorox's motion for judgment as a matter of law. However, Fifth Circuit jurisprudence is clear that whether evidence is sufficient to create an issue of fact for the jury is solely a question of law to be determined by the court. *United States for Use and Benefit of Weyerhaeuser Co. v. Bucon Construction Co.*, 430 F.2d 420, 423 (5th Cir. 1970). It is firmly established in the Fifth Circuit that in diversity cases, the federal test controls on the sufficiency of the evidence. *Deus v. Allstate Ins. Co.*, 800 F.Supp. 420, 422

(W.D. La. 1992), *citing, United States v. Williams*, 441 F.2d 637, 644 (5th Cir. 1971); *Pope v. Safeway Stores, Inc.*, 425 F.2d 1161 (5th Cir. 1970).

As the Court of Appeals ruled in the present case, the " 'facts' proven by Omnitech at trial [do not] support a claim for unfair trade practices as a matter of law." Pet. Appendix A, at p.36. Since the Fifth Circuit reviews ruling on Rule 50 motions *de novo*, applying the same standard of review as the district court, there is simply no error in this case to justify the granting of Omnitech's petition for writ of certiorari. *Resolution Trust Corp. v. Cramer*, 6 F.3d 1102, 1109 (5th Cir. 1993); *Letterman Bros, supra*, 799 F.2d at 972; *Spuler v. Pickar*, 958 F.2d 103, 105 (5th Cir. 1992); *United States Industries, Inc. v. Aetna Cas. & Sur. Co.*, 690 F.2d 459, 463 (5th Cir. 1982).

II. STATEMENT OF THE CASE

In reversing the trial court's denial of Clorox's motion for judgment as a matter of law and finding that Clorox did not commit an unfair trade practice, the Fifth Circuit properly recognized that the parties' relationship was governed by two agreements with clear and explicit terms, and that Clorox did not violate any of the terms of those agreements nor engage in any deceptive or fraudulent conduct.[1] Specifically, Clorox and Omnitech executed a Non-Disclosure Agreement dated November 8, 1989, and confected in final form on November 30, 1989. The purpose of the Agreement was to control the use of

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[1] Clorox adopts and incorporates by reference the Fifth Circuit's discussion of the background of this case contained in Pet. Appendix A, pp. 3-13.

information by a non-disclosing party to the agreement, and Clorox insisted upon executing the Agreement to protect the confidentiality of its interest in the insecticide category. *See* Appendix A; Record Excerpt ("R.E.") No. 8.

The Non-Disclosure Agreement does not state or even suggest that Clorox was somehow prevented from using its own "confidential information" that had been generated by Clorox to investigate opportunities in the insecticide category prior to even hearing of Omnitech or "Dr. X", and was still being generated for that purpose. The Agreement also does not provide that it would operate as a non-compete agreement between Omnitech and Clorox. In fact, the word "compete" is not used in any portion of the Non-Disclosure Agreement that establishes the obligations between Clorox and Omnitech. Appendix A.

Moreover, the Agreement did not impose any obligations upon Clorox to purchase "Dr. X" or to market the "Dr. X" products and in fact, the Non-Disclosure Agreement "provided Clorox with an opportunity to terminate its relationship with Omnitech." *See* Pet. Appendix A, at p. 7. The Agreement expressly provides that "in the event that Clorox, based upon the evaluation by the parties hereto of the 'Doctor X' insecticide product and other products in the insecticide product category, decides in writing not to continue to participate in the development and marketing of such products, then any party to this Agreement agrees to maintain the confidentiality of any Confidential Information disclosed by a party pursuant to this Agreement." Appendix A.

The parties also executed a Letter of Intent dated November 30, 1989, which granted Clorox an exclusive

option and right of first refusal to purchase "all trademarks relating to the 'Dr. X' product and/or to purchase the business and all of the assets of Omnitech." The Letter of Intent did not impose any obligations upon Clorox to purchase "Dr. X" and/or the business and assets of Omnitech, but merely gave Clorox an option and right of first refusal which was to expire on December 31, 1990. Clorox also provided Omnitech with a $100,000 licensing fee under the Letter of Intent and guaranteed a $2.5 million letter of credit on behalf of Omnitech. Appendix B; R.E. No. 9.

The Fifth Circuit correctly ruled that there was no basis for the jury's finding that Clorox engaged in any unfair trade practice because there was nothing in the parties' agreements which prohibited Clorox from evaluating all of the available information and making an informed decision concerning a possible entry into the insecticide category, or from purchasing another insecticide company. Pursuant to its *de novo* review, the Fifth Circuit noted that Omnitech's president conceded at trial "that there was 'no agreement between Omnitech and Clorox which prevented Clorox from investigating the purchase of another brand of insecticide' and that he was 'not aware of any agreements that prevented Clorox from actually purchasing another brand of insecticide.' " Pet. Appendix A, p. 26. Therefore, "[a]lthough Clorox eventually purchased a competitor of Omnitech's, the parties had never agreed that Clorox was forbidden from doing so." Pet. Appendix A, p. 39.

Similarly, the petitioner's assertions to this Court that Clorox somehow committed an unfair trade practice because "Omnitech, believing for more than a year that Clorox was acting in good faith, did not seek any other

marketing 'partner,' and continued to restrict the markets where it sold the 'Dr. X' product," were also addressed by the Fifth Circuit in concluding that Clorox did not violate the LUTPA. Based upon the uncontroverted evidence at trial, the Court of Appeals ruled:

> [P]ursuant to the agreements between the parties, Omnitech voluntarily made itself available for purchase by Clorox under an option and right of first refusal, for which it was paid a valuable consideration – Clorox' corporate guaranty of a $2.5 million line of credit which, evidently, Omnitech needed desperately and which it was unlikely to obtain on the basis of its own credit. Although it chose to forego other suitors for a one-year period, Omnitech elected, in its business judgment, to take its chances with Clorox since Clorox had advantages over the other possible contenders, including immediate cash and the letter of credit guaranty.
>
> Further, the "restrictions" upon Omnitech of marketing only to the geographic and categoric areas in which it was already participating were quite reasonable, especially in light of the fact that Omnitech did not have the financial means to expand those markets without an investing partner.

Pet. Appendix A, pp. 39-40.

It is ironic that Omnitech continues in its quest to assert that Clorox committed an unfair trade practice, when the evidence at trial clearly revealed that Omnitech, not Clorox, engaged in deceptive misrepresentations and omissions. Although Clorox paid Omnitech $100,000.00 and guaranteed a $2.5 million line of credit to purchase an option and right of first refusal for the rights to Dr. X

pursuant to the Letter of Intent, "the undisputed evidence proves that Omnitech sold all of its Dr. X assets to Ogden [Laboratories] in exchange for a sizeable sum of cash *prior* to its execution of the Non-Disclosure Agreement and Letter of Intent." Pet. Appendix A, p. 15, n. 8. (Emphasis in original).

On July 31, 1989, Omnitech sold to Ogden Laboratories all rights and actions of warranty to "the entire 'Dr. X' product line, including but not limited to roach sprays and other insecticides, whether such product line is presently existing or is developed in the future." Appendix C; R.E. No. 10. Omnitech was paid approximately $539,000.00 by Ogden Labs for the "Dr. X" rights, and merely retained the exclusive rights to be the sole manufacturer of the entire "Dr. X" product line. Appendix C. As recognized by the Fifth Circuit, the record at trial reflects that none of the Omnitech principals disclosed this transfer to Clorox. *See* Pet. Appendix A, p. 15, n. 8.

After concluding that Omnitech failed to present evidence at trial to support even its own assertions that Clorox violated the LUTPA, the Fifth Circuit stated that "the real thrust of the LUTPA, modeled after the Federal Trade Commission Act, 15 U.S.C. section 45, is to deter injury to competition." Pet. Appendix A, p. 36. The Court cited *Federal Trade Commission v. Raladam Co.*, 51 S.Ct 587 (1931), where this Court affirmed the reversal of a Federal Trade Commission cease and desist order because "there [was] neither a finding nor evidence from which the conclusion legitimately can be drawn that these advertisements substantially injured or tended thus to injure the business of any competitor." After citing *Raladam*, the Fifth Circuit properly concluded:

> We find it difficult to say that Clorox' purchase of Combat put Omnitech in a different position in the market than it would have been if Clorox had merely decided not to purchase Omnitech. There is no evidence to suggest that Combat would not have been purchased by another bidder and thereby stayed in the market. *Absent any showing that Clorox used Omnitech's trade secrets to better Combat's position in the marketplace or worsen Omnitech's, thus infringing upon competition, we cannot find a violation of the LUTPA.*

Pet. Appendix A, pp. 36-37.

The Appellate Court ruled, as a matter of law, that there was no basis for Omnitech's claim for unfair trade practices. The real question is not whether there is literally no evidence supporting the party against whom the motion is directed, but whether there is evidence upon which the jury could properly find a verdict for that party. *Deus v. Allstate Ins. Co.*, 800 F.Supp. 420, 422 (W.D. La. 1992), *citing, Improvement Co. v. Munson*, 20 L.Ed. 867 (1871). Because such evidence was completely absent in the present case, Omnitech's petition for writ of certiorari should be denied by this Court.

III. SUMMARY OF ARGUMENT

A. Contrary to the petitioner's misstatements otherwise, a motion for judgment as a matter of law is reviewed *de novo* by the Fifth Circuit, applying the same legal standard as the trial court. In evaluating such a motion, formerly referred to as a motion for directed verdict, the court is to view the entire trial record in the light most favorable to the non-movant and draw all

inferences in its favor. *Becker v. Paine-Webber, Inc.*, 962 F.2d 524, 526 (5th Cir. 1992). If the evidence at trial points so strongly and overwhelmingly in the movant's favor that reasonable jurors could not reach a contrary conclusion, the appellate court will conclude that the motion should have been granted. Fed. R. Civ. P. 50(a); *Resolution Trust, supra*, 6 F.3d at 1109.

Whether a verdict should have been directed is a question of law and, therefore, litigants are entitled to a full review by the appellate court without special deference to the views of the trial court. *Bridges v. Groendyke Transport, Inc.*, 553 F.2d 877, 878 (5th Cir. 1977). The appellate court may reverse the district court's denial of a motion for judgment as a matter of law if it concludes on the entire record construed in the light most favorable to the non-moving party, that the evidence is so overwhelmingly in favor of the moving party that no reasonable jury could have arrived at the disputed verdict. *Long v. Shultz Cattle Co., Inc.*, 881 F.2d 129, 132 (5th Cir. 1989). In reversing the trial court's denial of the motion for judgment as a matter of law filed by Clorox, the Fifth Circuit applied the correct standard of review as previously articulated by the Fifth Circuit and this Honorable Court.

B. In reviewing the trial court's denial of the motion for judgment as a matter of law *de novo*, the Fifth Circuit properly ruled that Omnitech's claim for unfair trade practices should be dismissed because no substantial evidence was presented at trial to support this claim. In so ruling, the Fifth Circuit correctly determined that Omnitech completely failed to satisfy its legal burden of proof to support the following claims: (1) that its ability to

compete was injured by Clorox's actions; (2) that Clorox used Omnitech's alleged "confidential information" to hurt Omnitech, thus infringing upon competition; (3) that Clorox committed fraud; (4) that the parties' agreements and ethical business practices precluded Clorox's purchases of Combat; and (5) that the express terms of the parties' two written agreements which anticipated that the deal might not be completed, should not govern. *See* Pet. Appendix A, pp. 35-40. Having so concluded from the evidence presented at trial, the Fifth Circuit determined that Clorox did not commit an unfair trade practice "as a matter of Louisiana law."

C. Boiled down to its barest essence, the issue raised by the petitioner is whether the Fifth Circuit Court of Appeals was prohibited from reversing the trial court's denial of Clorox's motion for judgment as a matter of law, despite the fact that there was no "substantial evidence" presented by Omnitech at trial to support its claim for unfair trade practices. Petitioner bases its entire argument on the premise that "the trial court has heard all the evidence from both parties and has decided that enough evidence was presented to go to the jury to consider the Unfair Trade Practices claim. That decision is entitled to great deference, lest the litigants be lightly deprived a jury trial." Pet., pp. 13-14.

There is no merit to the petitioner's assertions. Rule 50(a) of the Federal Rules of Civil Procedure clearly requires the court to enter judgment as a matter of law and take a case away from the jury where no evidence is presented at trial to support the claim. As this Court stated in *Anderson v. Liberty Lobby, Inc.*, 106 S.Ct. 2505, 2511 (1986), "the trial judge must direct a verdict if, under

the governing law, there can be but one reasonable conclusion as to the verdict." This "decision to grant a directed verdict or a judgment notwithstanding the verdict is not a matter of discretion, but a conclusion of law based upon a finding that there is insufficient evidence to create a fact question for the jury." *Letterman Brothers, supra,* 799 F.2d at 972. Contrary to the petitioner's statements otherwise, the Fifth Circuit's reversal of the trial court's denial of Clorox's motion for judgment as a matter of law was correct, such that the petition for writ of certiorari should be denied.

IV. ARGUMENT

(A) STANDARD OF REVIEW.

Judgments as a matter of law are governed by Rule 50(a) of the Federal Rules of Civil Procedure, which provides in relevant part:

> If during a trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue, the court may determine the issue against that party and may grant a motion for judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue.

In its *en banc* decision in *Boeing Co,,* the Fifth Circuit articulated the applicable standard for determining the propriety of motions for directed verdicts and judgments notwithstanding the verdict, presently referred to as motions for judgment as a matter of law.

> If the facts and inferences point so strongly and overwhelmingly in favor of one party that the Court believes that reasonable men could not arrive at a contrary verdict, granting of the motions is proper . . . *A mere scintilla of evidence is insufficient to present a question for the jury.* The motions for directed verdict and judgment n.o.v. should not be decided by which side has the better of the case, nor should they be granted only when there is a complete absence of probative facts to support a jury verdict. *There must be a conflict in substantial evidence to create a jury question.*

411 F.2d at 374 - 75 (emphasis supplied).

On motions for directed verdict and for judgment notwithstanding the verdict, the Court should consider all of the evidence – not just that evidence which supports the non-movant's case – but in the light and with all reasonable inferences most favorable to the party opposed to the motion. As previously stated, "a judge's decision to grant a directed verdict or a judgment notwithstanding the verdict is not a matter of discretion, but a conclusion of law based upon a finding that there is insufficient evidence to create a fact question for the jury." *Letterman Bros., supra,* 799 F.2d at 972; *Conkling v. Turner,* 18 F.3d 1285, 1301 (5th Cir. 1994).

In representing to this Court that the Fifth Circuit's application of a *de novo* standard of review "is contrary to the legislative history of Federal Rule of Civil Procedure 50, prior holdings of the Court of Appeal and this Court," petitioner has blatantly misrepresented and misstated the relevant jurisprudence. Since it was first articulated in *Boeing,* the Fifth Circuit has not wavered from the *de novo*

test for reviewing the propriety of motions for directed verdict and judgments notwithstanding the verdict. *See Lubbock Feedlots, Inc. v. Iowa Beef Processors, Inc.*, 630 F.2d 250, 269, n.22 (5th Cir. 1980); *Harwood & Associates, Inc. v. Texas Bank & Trust*, 654 F.2d 1073, 1076 (5th Cir. 1981); *Whiting v. Jackson State University*, 616 F.2d 116, 123 (5th Cir. 1980); *Letterman Bros., supra*, 799 F.2d at 971; *Long, supra*, 881 F.2d at 132; *Conkling, supra*, 18 F.3d at 1300.

While the petitioner has represented otherwise to this Court, the same standard of review which is applied by the trial court on motions for judgment as a matter of law, is applied by the Fifth Circuit on appeal. *See Letterman Bros., supra*, 799 F.2d at 972; *Springborn v. American Commercial Barge Lines, Inc.*, 767 F.2d 89, 94 (5th Cir. 1985). As the Court stated in *Spuler, supra*, "on appeal, we apply an identical legal standard, viewing the evidence in the fashion most favorable to the party opposing the motion." 958 F.2d at 105.

Petitioner Omnitech has not only provided this Court with an inaccurate statement of the Fifth Circuit standard for determining the correctness of granting a motion for judgment as a matter of law, but has also completely distorted this Court's own rulings. In its petition for writ of certiorari, Omnitech asserts that the *de novo* standard of review somehow violates a party's Seventh Amendment right to a jury trial. Pet., p. 12. Again, the petitioner's bold assertions are not supported by the relevant jurisprudence.

In *Neely v. Martin K. Eby Construction Co.*, 87 S.Ct. 1072 (1967), this Court laid to rest the erroneous assertion that Rule 50 of the Federal Rules of Civil Procedure

violates the Seventh Amendment's guarantee of a jury trial. According to the Court, "it is settled that Rule 50(b) does not violate the Seventh Amendment's guarantee of a jury trial." 87 S.Ct. at 1076. In expressly holding that the Court of Appeals may reverse the denial of a motion for judgment notwithstanding the verdict and order dismissal or direct entry of judgment for the defendant itself, this Court reasoned as follows:

> As far as the Seventh Amendment's right to a jury trial is concerned, there is no greater restriction on the province of the jury when an appellate court enters judgment n.o.v. than when a trial court does; *consequently, there is no constitutional bar to an appellate court granting judgment n.o.v.* Likewise, the statutory grant of appellate jurisdiction to the courts of appeals is certainly broad enough to include the power to direct entry of judgment n.o.v. on appeal.

87 S.Ct. at 1076 (citations omitted)(emphasis supplied).

In stark contrast to the petitioner's assertions that the appellate court is somehow precluded from reversing the trial court's denial of a motion for judgment as a matter of law, in *Neely*, this Court expressly stated that the Court of Appeals has the power to direct entry of judgment. 87 S.Ct. at 1081. Specifically:

> [The] considerations [limiting the granting of a motion j.n.o.v.] do not justify an ironclad rule that the court of appeals should never order dismissal or judgment for defendant when the plaintiff's verdict has been set aside on appeal. *Such a rule would not serve the purpose of Rule 50 to speed litigation and to avoid unnecessary retrials. Nor do any of our cases mandate such a rule. . . .* In

> view of these cases [citations omitted], the language of Rule 50(d) and the statutory grant of broad appellate jurisdiction, we think a more discriminating approach is preferable to the inflexible rule for which the petitioner contends.

87 S.Ct. at 1078 (emphasis supplied).

To further support its groundless assertions that the Fifth Circuit improperly intruded into the domain of the trial judge and the jury, Omnitech also does not provide this Court with the complete legislative history to Rule 50. As stated in Omnitech's petition, the Notes of the Advisory Committee to Rule 50 do provide that "[t]he expressed standard makes clear that action taken under the rule is a performance of the court's duty to assure enforcement of the controlling law and is not an intrusion on any responsibility for factual determinations conferred on the jury by the Seventh Amendment or any other provision of federal law." However, in bringing the Court's attention to this legislative history, Omnitech omits to include a significant portion of the quoted legislative history, which states:

> Paragraph (a)(1) articulates the standard for the granting of a motion for judgment as a matter of law. It effects no change in the existing standard. *That existing standard was not expressed in the former rule, but was articulated in long-standing case law.*

(Emphasis supplied).

The "long-standing case law" of the Fifth Circuit is well-established that the motion for judgment as a matter of law is reviewed *de novo* by the Fifth Circuit, applying the same legal standard as the trial court. *Long, supra,* 881

F.2d at 132. Therefore, the petitioner's argument that the Fifth Circuit improperly applied the *de novo* standard of review in granting the motion for judgment as a matter of law, is not supported by, and in fact, is clearly contradicted by the prior holdings of this Court, relevant Fifth Circuit jurisprudence, the express language of Rule 50 as well as the legislative history of that Rule. Omnitech's discussion of the proper standard of review which is contained in its petition for writ of certiorari, is nothing more than a misstatement and mischaracterization of well-established caselaw designed to improperly mislead this Court. The Fifth Circuit's *de novo* review of Clorox's motion for judgment as a matter of law was correct under the relevant jurisprudence, such that this petition should be denied.

(B) MOTIONS FOR JUDGMENT AS A MATTER OF LAW AND MOTIONS FOR A NEW TRIAL ARE CONSIDERED UNDER DIFFERENT STANDARDS OF REVIEW.

Continuing in its efforts to confuse the relevant legal issues, petitioner repeatedly discusses the "abuse of discretion" standard to support its assertions that the Fifth Circuit applied the wrong standard of review. However, close review of the cases and authorities cited by Omnitech to support this argument reveals that the abuse of discretion standard is applied where a party has moved for a new trial; it does not apply where the court is considering the granting or denial of a motion for judgment as a matter of law, which is at issue in the present case.

The rationale in treating these post-trial motions differently was addressed by the Fifth Circuit in *Bucon Construction Co., supra.* As the Court stated:

> There is an important distinction between a motion for a directed verdict or a motion for a judgment n.o.v. on the one hand and a motion for a new trial on the other. *In passing on a motion for a directed verdict, or for a judgment n.o.v., the court does not exercise discretion, but decides a pure question of law,* that is, whether the evidence, considered in the light most favorable to the party against whom the motion is directed, affords substantial support for a verdict in his favor.
>
> * * *
>
> In passing on a motion for a new trial, the court may and should exercise a sound discretion, and its ruling thereon will not be reviewed in an appellate court in the absence of a clear abuse of discretion.
>
> * * *
>
> The distinction above stated between a motion for a directed verdict or for judgment n.o.v. on the one hand and motion for a new trial on the other was firmly embedded in the common law and has long been recognized by the decisions of this court and other national courts.

430 F.2d at 423-24 (emphasis supplied).

Thus, as Omnitech is fully aware, the standard of review in a motion for a new trial situation greatly differs from that set out in *Boeing, supra,* governing motions for directed verdict and judgments n.o.v. *Lubbock, supra,* 630 F.2d at 269. The decision whether to grant a new trial is

"within the discretion of the district court and may be granted even if the moving party is not entitled to judgment as a matter of law." *Long, supra,* 881 F.2d at 132.

It is clear that no legal basis whatsoever exists for Omnitech's detailed discussion of the "abuse of discretion" standard of review, other than to confuse this Court as to the relevant legal issues. It is not disputed that the denial of a motion for judgment as a matter of law and not a motion for a new trial was before the Fifth Circuit in the present case, such that a *de novo* standard of review was correct.

(C) THE FIFTH CIRCUIT CORRECTLY RULED, AS A MATTER OF LAW, THAT THERE WAS NO EVIDENCE TO SUPPORT OMNITECH'S CLAIM FOR UNFAIR TRADE PRACTICES.

In a final attempt to convince this Court that the Fifth Circuit somehow improperly intruded upon the jury's province in reversing the district court's denial of Clorox's motion for judgment as a matter of law, Omnitech asserts that the determination of whether Clorox violated the LUTPA is "clearly a mixed question of fact and law, the determination of fact being reserved to the trial judge and the jury." Pet., p. 16. Omnitech goes on to argue that "[a]lthough the Court of Appeal concluded that the statute requires fraud, a clear reading of the statute itself indicates that an unfair trade practice can be based on either a misrepresentation or deception, in addition to fraud." Pet., p. 18. Again, the petitioner has misstated the Fifth Circuit's ruling as well as relevant Fifth Circuit and Louisiana jurisprudence.

First, the Court of Appeals did not, as asserted by Omnitech, "conclude that the statute requires fraud." Pet., p. 18. In its ruling, the Court of Appeals cited applicable Louisiana jurisprudence to the effect that to recover under the Unfair Trade Practices Act, a plaintiff must "prove some element of fraud, misrepresentation, deception or other unethical conduct." Pet. Appendix A, p. 38, *citing Dufau, supra,* 465 So.2d at 758.

In finding that Clorox did not commit an unfair trade practice, the Court also correctly cited Louisiana jurisprudence to the effect that where the evidence reveals merely a normal business relationship, Louisiana courts have avoided imposing liability under the LUTPA. However, where clear evidence of fraud or a specific intent to injure a competitor exists, the Louisiana courts have been more willing to apply the LUTPA. *See* cases cited by Fifth Circuit in Pet. Appendix A, p. 38. Applying the standards announced by the Louisiana courts in determining whether to impose liability under the LUTPA, the Fifth Circuit correctly concluded that Clorox's actions did not violate the statute. Nowhere in its petition for writ of certiorari does Omnitech discuss or even cite any Louisiana caselaw that contradicts the decisions relied upon by the Court in reversing the finding of an unfair trade practice.

Moreover, Omnitech's assertion that the "elements of misrepresentation, deceptive or oppressive conduct, are admittedly subjective and are particularly appropriate for a jury determination", simply begs but does not address the relevant issue. *See* Pet., p. 20. As even Omnitech has acknowledged, to establish a claim for unfair trade practices, it was required to "prove the elements of the claim

by a preponderance of the evidence." Pet., p. 17. As was apparent to the Fifth Circuit in reversing the jury's verdict, Omnitech completely failed to meet its legal burden of proof on that claim, such that it should have been dismissed as a matter of law. "A directed verdict is not limited to those situations in which there is a complete absence of probative facts to support a jury verdict. It is also warranted when there is no conflict in substantial evidence." *Excel Handbag Co. v. Edison Bros. Stores, Inc.*, 630 F.2d 379, 384 (5th Cir. 1980).

In the present case, there was simply no substantial or probative evidence to support the jury's finding of an unfair trade practice. The Fifth Circuit referred to the following undisputed facts in dismissing Omnitech's claim for unfair trade practices:

> The testimony and documentary evidence does not present a picture of deceptive activity but simply a case where Clorox entered into preliminary agreements to purchase Dr. X., subsequently deciding not to go further in the absence of any obligation to do so. Although Clorox eventually purchased a competitor of Omnitech's, the parties had never agreed that Clorox was forbidden from doing so. Moreover, the undisputed evidence reflects that the Combat purchase did not preclude purchase of the Omnitech products as well. Clorox' investigation of the possibility of integrating the Combat and Dr. X products was neither precluded by the parties' agreements nor by ethical business practices.

Pet. Appendix A, p. 39.

As previously discussed, the undisputed evidence of the case also showed that Omnitech, "in its business judgment, [elected] to take its chances with Clorox since Clorox had advantages over the other possible contenders, including immediate cash and the letter of credit guaranty." "The objective evidence [further] reflects that Clorox' pursuit of Omnitech was genuine." Pet. Appendix A, p. 40. After reviewing all of the evidence that was presented at trial, the Fifth Circuit concluded:

> In sum, Omnitech is the disappointed potential target of a white knight, protesting a deal that fell apart before it was complete – a possibility that was anticipated by the express terms of the parties' interim agreements – *but it is simply not the victim of any unfair trade practice as a matter of Louisiana law.*

Pet. Appendix A, p.40 (emphasis supplied).

Contrary to the petitioner's assertions that the Fifth Circuit abused its discretion in reversing the jury's verdict that Clorox committed an unfair trade practice, the Fifth Circuit, as a matter of law, was required to grant the motion once it determined that there was insufficient evidence for the matter to have gone to the jury. *See Letterman Bros., supra,* 799 F.2d at 972. As this Court stated long ago in *Improvement Co., supra,* cited in *Anderson, supra*:

> Judges [are no] longer required to submit a question to a jury merely because some evidence has been introduced by the party having the burden of proof, unless the evidence be of such a character that it would warrant the jury in finding a verdict in favor of that party. Formerly it was held that if there was what is called a

> *scintilla* of evidence in support of a case the judge was bound to leave it to the jury, but recent decisions of high authority have established a more reasonable rule, that in every case, before the evidence is left to the jury, there is a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury could properly proceed to find a verdict for the party producing it, upon whom the *onus* of proof is imposed.

(Emphasis in the original).

Consistent with this standard, Louisiana federal and state courts have dismissed claims for unfair trade practices on pre-trial and post-trial motions when there is a complete absence of facts to support such claims. In a recent decision directly applicable to the instant case, the trial court's denial of a Rule 50(a) motion for judgment as a matter of law to dismiss a claim for unfair trade practices, was reversed by the Fifth Circuit Court of Appeals.

Turner v. Purina Mills, Inc., 989 F.2d 1419 (5th Cir. 1993), involved an action by a former animal feed dealer against the animal feed's manufacturer alleging that the manufacturer violated the LUTPA by soliciting its customers with one of its competitors present; offering credit to those customers; cancelling the parties' dealership; and formulating a desire to eliminate the plaintiff's dealership. 949 F.2d at 1421. Although the agreement between the parties in *Turner* specified that the parties were to conduct business with each other in a "moral, legal, and ethical manner," the Fifth Circuit reversed the jury's finding that Purina committed an unfair trade practice. In

holding as a matter of law that Purina did not violate the LUTPA, the Fifth Circuit reasoned:

> LUTPA does not prohibit sound business practices, the exercise of permissible business judgment, or appropriate free enterprise transactions. The statute does not forbid a business to do what everyone knows a business must do: make money. Businesses in Louisiana are still free to pursue profit, even at the expense of competitors, so long as the means used are not egregious. Finally, the statute does not provide an alternate remedy for simple breaches of contract. There is a great deal of daylight between a breach of contract claim and the egregious behavior the statute proscribes.
>
> * * *
>
> There was no fraud, misrepresentation, deception, or similar ethical breach in the cancellation of the contract. Purina had every right under the circumstances to end Turner's dealership. We therefore refuse to bind Purina to a contract term for which Turner never bargained by awarding him prospective profits.

989 F.2d at 1422-23 (citations omitted).

Citing *Turner*, the Fifth Circuit in the present case also determined that there were no allegations or evidence of fraud, and that the parties' express agreements did not prohibit any act taken by Clorox. *See* Pet. Appendix A, p. 39. Based upon the absence of probative evidence to support the claim, this holding was correct.

In *J.D. Tufts II v. Amoco Production Co.*, 1991 WL 61483 (E.D. La. 1991), *aff'd*, 948 F.2d 1286 (5th Cir. 1991), plaintiffs/owners of working interests in a gas field sued

Amoco based upon its refusal to market and purchase the plaintiffs' gas. The court rejected the plaintiffs' LUTPA claim on summary judgment, holding that the "[d]efendants had no duty to market or purchase plaintiffs' gas . . . . The fact that plaintiffs suffered a decline in revenue, in the face of a falling market, does not make this action an unfair practice within the meaning of the act." *Id.* at p. 9. In so holding, the court reasoned that when the actions of the defendants " *'are simply sound business practices, the exercise of permissible business judgment and/or appropriate free enterprise transactions', plaintiffs cannot recover under this statute.*" *Id.*

In *Pizzaloto v. The Hoover Company*, 486 So.2d 124, 127 (La. App. 5th Cir.), *writ denied*, 488 So.2d 202 (La. 1986), the Louisiana Court of Appeal affirmed the granting of the trial court's dismissal of the plaintiffs' claim on a motion for summary judgment, stating that the plaintiffs failed to present a genuine issue of material fact in connection with this claim, and therefore, it should be dismissed.

Similarly, the Louisiana Court of Appeal in *Belle Pass Terminal, Inc. v. Jolin, Inc.*, 618 So.2d 1076, 1081 (La. App. 1st Cir.), *writ denied*, 626 So.2d 1172 (La. 1993), sustained an exception of no cause of action to dismiss the claim for unfair trade practices. The Court in *Belle Pass* ruled as follows:

> The law is well settled that the function of the exception of no cause of action is to test the legal sufficiency of the petition. The correctness of the well-pleaded allegations of fact is conceded, so the issue becomes whether the face of

> the petition presents a case which legally entitles mover to the redress sought. Every reasonable interpretation must be accorded to the language of the petition in favor of maintaining the sufficiency of the petition and affording the litigant an opportunity to present his evidence. Any reasonable doubt as to the legal sufficiency of the plaintiff's petition must be resolved in favor of a finding that the petition has stated a cause of action. Documents and other exhibits must be considered in evaluating whether plaintiff has stated a cause of action, and the contents of such addendum must also be accepted as true.

618 So.2d at 1079 (citations omitted).

Even under this stringent standard, the Court in *Belle Pass* held that the defendants did not state a claim for unfair trade practices under the statute. Reviewing the allegations of the petition, the Court ruled that "the appellants have not alleged any conduct that offends established public policy, nor have they alleged that the conduct complained of, as applied to a consumer or business competitor, would be unethical, oppressive or substantially injurious." 618 So.2d at 1081. In so holding, the Court stated that while the statute has been interpreted as "broad and subjective", the "broadness or subjectivity of the act still does not relieve [the petitioner] from stating a claim for which they can receive a legal remedy under the application of substantive law." *Id.*

Therefore, as the Fifth Circuit correctly noted, the mere fact that Omnitech asserted that Clorox somehow violated the LUTPA does not preclude the Court from granting a motion for judgment as a matter of law, where

no evidence was presented at trial to support the claim. The Fifth Circuit's reasoning in *Neely v. Delta Brick & Tile Co., Inc.*, 817 F.2d 1224, 1226 (5th Cir. 1987), is directly on point: "*Boeing* assumes that some evidence may exist to support a position which is yet so overwhelmed by contrary proof as to yield to a directed verdict; *it is not necessary that the evidence be no more than a scintilla or amount to a claim that frogs fly or stones levitate.*" (Emphasis supplied). Despite Herculean efforts by the petitioner to suggest otherwise, the Fifth Circuit in the present case correctly determined that any evidence that tended to support Omnitech's claim that Clorox committed an unfair trade practice, was "completely overwhelmed by contrary proof." Therefore, Clorox's motion for judgment as a matter of law was properly granted such that this petition for writ should be denied.

V. CONCLUSION

Petitioner has not stated a valid case for this Court to grant the requested writ. Rule 10 of the Rules of the Supreme Court states the considerations that the Court will review on a writ of certiorari:

> .1. A review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered:
>
> (a) When a United States court of appeals has rendered a decision in conflict with the decision of another United States court of appeals

> on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

It is clear that Omnitech's petition for writ of certiorari does not satisfy this standard. The Fifth Circuit's decision is not in conflict with the decisions of other court of appeals, but is completely consistent with such decisions, the holdings of this Court, as well as the statutory requirements. In the instant case, the Court of Appeals was faced with a situation where there simply was no evidence to support the jury's verdict, such that dismissal was mandated as a matter of law. Respondent, The Clorox Company, respectfully requests that this Court affirm the Fifth Circuit's decision and deny Omnitech's Petition for Writ of Certiorari.

Respectfully submitted,

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(La. Bar No. 2079)
Counsel of Record
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Attorneys for Respondent,
The Clorox Company

APPENDIX A

Final
11/8/89

NON-DISCLOSURE AGREEMENT

CONFIDENTIAL

This Non-Disclosure Agreement ("Agreement") is dated November 8, 1989 and is made by and between The Clorox Company, a Delaware corporation with a principal place of business at 1221 Broadway, Oakland, California 94612 ("Clorox"), Omnitech International Inc., a Louisiana corporation with a principal place of business at 800 North Acadia Road, Thibodaux, Louisiana 70301 ("Omnitech"), Seabright, Inc., a California corporation with a principal place of business at 113 Seabright Avenue, Santa Cruz, California 95060 ("Seabright"), Peachtree Creek Business Group, a Georgia partnership with a business mailing address at Star Route Box 478, Sausalito, California 94965 ("Peachtree"), and PSL Marketing [Resources], Inc., a California corporation with a principal place of business at 10 Lombard Street, Suite 400, San Francisco, California 94111 ("PSL"). This Agreement supersedes any and all previous non-disclosure/ confidentiality agreements, if any, entered into by Clorox with each of Omnitech, Seabright and Peachtree.

The purpose of this Agreement is for Clorox, Omnitech, Seabright, Peachtree and PSL to share non-public information defined below as "Confidential Information" relating to the evaluation of the "Doctor X" insecticide product and other products in the insecticide product category for the purposes of development and marketing of such products. Each party to this Agreement that does

not disclose "Confidential Information" ("non-disclosing party") agrees to treat all Confidential Information provided by a party to this Agreement ("disclosing party") as trade secrets which shall not be disclosed to any one other than a non-disclosing party's employees or agents who have a need to know in order to complete assigned responsibilities. Each non-disclosing party also agrees to take all reasonable measures to guard against the unwarranted use or disclosure of any information ("Confidential Information") received by a non-disclosing party during all discussions and negotiations relating to the evaluation of the "Doctor X" insecticide product and other products in the insecticide product category for the purposes of development and marketing of such products.

Confidential information, as defined above, shall not include any of the following:

(a) information which at the time of initial disclosure or after said disclosure is, or becomes publicly known or available to the public through publication or otherwise by the disclosing party, except as it becomes known by a breach of this Agreement;

(b) information which a non-disclosing party can establish was in its possession at the time of disclosure; and

(c) information developed solely from a non-disclosing party's own independent research.

In the event that Clorox, based upon the evaluation by the parties hereto of the "Doctor X" insecticide product and other products in the insecticide product category, decides in writing not to continue to participate in the development and marketing of such products, then each

party to this Agreement agrees to maintain the confidentiality of any Confidential Information disclosed by a disclosing party pursuant to this Agreement for a period of seven (7) years from the date of execution of this Agreement (except, however, that Clorox agrees to allow Omnitech to use all mutually agreed to marketing information [as defined and described in Addendum #1 of this Agreement /s/ AWB 11/30 /s/ FSC 11/30] to market the "Doctor X" insecticide product to third parties after Clorox decides in writing not to continue to participate in the development of any insecticide product), or until (i) a disclosing party agrees in writing to waive the confidential nature of such information it discloses; or (ii) such information becomes publicly available other than through disclosures in violation of this Agreement and then the obligation to maintain the confidentiality of all Confidential Information shall cease only as to such information that becomes publicly available as aforesaid; however, notwithstanding the foregoing provision, that at the time Clorox decides in writing not to continue to participate in the development and marketing of such products, Peachtree and PSL shall then be free to offer their consultant services to any competitor in the product category of insecticides subject to the terms of this Agreement. If Clorox decides in writing not to continue to participate in the development and marketing of the "Doctor X" insecticide product and other products in the insecticide product category, each non-disclosing party [with the exception of Omnitech, /s/ AWB, /s/ FSC] will (a) promptly return to the appropriate disclosing party confidential information disclosed by such party without retaining any copies of extracts thereof and (b) destroy all

memoranda, notes, reports, documents and other media, and all copies and extracts thereof, prepared by the employees or agents of such non-disclosing party in whole or in part from any Confidential Information. Confidential Information shall include, unless determined otherwise by Clorox in writing, whatever interests Clorox may possess in entering the product category of insecticides.

In the event, however, that Clorox decides to continue to participate in the development and marketing of the "Doctor X" insecticide product and other products in the insecticide product category but desires to terminate in writing the consulting services of Peachtree and/or PSL, then each party to this Agreement agrees to maintain the confidentiality of any Confidential Information disclosed by a disclosing party pursuant to this Agreement for a period of seven (7) years from the date of execution of this Agreement, or until (i) a disclosing party agrees in writing to waive the confidential nature of such information it discloses; or (ii) such information becomes publicly available other than through disclosures in violation of the Agreement and then the obligation to maintain the confidentiality of all Confidential Information shall cease only as to such information that becomes publicly available aforesaid; however, notwithstanding the foregoing provision, at the time Clorox decides in writing to terminate the services of Peachtree and/or PSL, then (a) in the event Peachtree is the terminated party, Peachtree agrees that it shall not offer or provide its consulting services to any competitor in the insecticide product category or work in any way whatsoever in such product category for a period of one and one-half (1½) years from the date of

termination of its services with Clorox and then only subject to the terms of this Agreement, and (b) in the event PSL is the terminated party, PSL agrees that it shall not offer or provide its consulting services to any competitor in the insecticide product category or work in any way whatsoever in such product category for a period of two (2) years from the date of termination of its services with Clorox and then only subject to the terms of this Agreement. If the services of Peachtree and/or PSL are terminated as aforesaid (a "terminated party"), then the terminated party will (i) promptly return to the disclosing parties all Confidential Information disclosed by such party without retaining any copies or extracts thereof and (ii) destroy all memoranda, notes, reports, documents and other media, and all copies and extracts thereof, prepared by the employees or agents of the terminated party in whole or in part from Confidential Information. Confidential Information shall include, unless determined otherwise by Clorox in writing, whatever interest Clorox may possess in entering the product category of insecticides.

If a non-disclosing party becomes legally compelled by interrogatories, legal requests in writing for information or documents, subpoenas, civil investigative demand or similar legal process to disclose any Confidential Information, such non-disclosing party will provide the appropriate disclosing party with prompt written notice so that such disclosing party may seek a protective order or other appropriate remedy or, at its sole option, waive compliance with this Agreement. If such protective order or other appropriate remedy is not obtained or such

disclosing party waives such compliance, the non-disclosing party will only furnish that portion of the information requested which is legally required and will use its best efforts to obtain reliable assurance that confidential treatment will be accorded the information that is disclosed.

Each non-disclosing party agrees that each disclosing party would be irreparably injured by any breach of this Agreement and that each disclosing party shall be entitled to remedies both in equity and in law, in the event of the breach of any provision of this Agreement by a non-disclosing party.

Date: November 8, 1989.

THE CLOROX COMPANY

By: /s/ A.W. Biebl
Its: /s/ Vice President

OMNITECH INTERNATIONAL, INC.

By: /s/ Fred Cortes
Its: /s/ President

SEABRIGHT, INC.

By: _____
Its:

PEACHTREE CREEK BUSINESS GROUP

By: /s/ Illegible
Its: /s/ Illegible

PSL MARKETING RESOURCES, INC.

By: /s/ Pamela S. Laird
Its: /s/ President

ADDENDUM #1

NON-DISCLOSURE AGREEMENT

EXHIBIT "A"

List of data that may be generated from Market Test.

1. Blind Test/Paired Comparison
2. Focus Group
3. Media Test
4. SAMI/Neilson Data
5. Competitive Data
6. Trade Interviews
7. Distribution Data
8. Pricing Comparisons
9. Simulated Market Tests
10 Promotion Data
11. Positioning Strategies

APPENDIX B

The Clorox Company
Household
Cleaning Products
Barbecue Products
Food Products
Architectural Coatings
Products for the
Food Service Industry

[LOGO]

P.O. Box 24305
Oakland, California
94623-1305
(415) 271-7000
Telecopy (415) 832-1463

Strictly Confidential

November 30, 1989

Omnitech International, Inc.
800 North Acadia Road
Thibodaux, Louisiana 70301

Re: *Doctor X Product*

Gentlemen:

This Letter of Intent proposes the general terms and conditions by which The Clorox Company ("Clorox") would (i) license all trademarks relating to the "Doctor X" insecticide product ("Doctor X" product) manufactured by Omnitech International, Inc. ("Omnitech"), on a non-exclusive basis, for certain cash and marketing-information consideration, as more fully described below, and (ii) guarantee a secured line of credit with a mutually-agreed to financial institution of up to two million five hundred thousand dollars ($2,500,000) to fund working capital necessary to Omnitech's continuing operations. The obligations of each of Clorox and Omnitech shall be made binding upon the execution of this Letter of Intent by the parties hereto. The terms and conditions of this Letter of Intent are as follows:

1. Clorox shall license all trademarks relating to the Doctor X product, on a non-exclusive basis, as defined below, in order to conduct laboratory and/or mini-market test marketing of the Doctor X product in certain stores and geographic areas selected by Clorox, for a period of time commencing on the date of execution of this Letter of Intent through August 31, 1990.

   The non-exclusive trademark license provided by Omnitech to Clorox shall include the rights to change in any way whatsoever the name and packaging of the Doctor X product during the time period of laboratory and/or mini-market test marketing conducted by Clorox. The trademark license provided to Clorox by Omnitech is non-exclusive in that it shall allow only Omnitech, in addition to Clorox, to market the Doctor X product. During the test marketing period pursuant to the licensing arrangement contained herein, Omnitech shall be able to market the Doctor X product pursuant to the following geographic and marketing accounts schedule:

   (i) With regard to Grocery Store marketing, Omnitech shall continue to market the Doctor X product only in those geographic areas in which it currently markets the Doctor X product. Specifically, the state of Louisiana, the state of Texas, and the Orlando-Tampa metropolitan areas of the state of Florida;

   (ii) With regard to Hardware Store marketing, Omnitech shall continue to market the Doctor X product in any geographic area of the United States and its territories without any restrictions whatsoever; and

   (iii) With regard to Mass Merchandise Store marketing, Omnitech shall continue to market the Doctor X product only to those Mass Merchandise

Store accounts to which it currently markets the Doctor X product.

2. In consideration of the rights provided by Omnitech to Clorox in Section 1 above, Omnitech shall receive from Clorox a licensing and test marketing fee of one-hundred thousand dollars ($100,000) in cash no later than sixty (60) days from the date of execution of this Letter of Intent. Such fee shall be non-refundable. Omnitech shall also receive from Clorox, as further consideration of the rights provided by Omnitech to Clorox in Section 1 above, mutually-agreed-to marketing information, as more fully described in Addendum #1 to the Non-Disclosure Agreement executed by the parties hereto and incorporated herein by reference, as well as certain marketing information received by Clorox from Peachtree Creek Business Group, as more fully described in the Non-Disclosure Agreement above-referenced.

3. Clorox shall, on behalf of Omnitech, guarantee a secured line of credit with a mutually-agreed to financial institution ("Financial Institution") of up to two million five hundred thousand dollars ($2,500,000) to fund working capital necessary to produce inventory and continue operations. Such guaranty shall be established at the time the line of credit is approved by the Financial Institution and shall terminate on December 31, 1990. The obligations of Clorox pursuant to such guaranty are subject to the following conditions:

   (i) The line of credit is secured by the Financial Institution against assets owned by Omnitech, including current and future accounts receivable held by Omnitech, as determined by the Financial Institution;

(ii) The line of credit shall be fully payable with interest by Omnitech no later than December 31, 1990;

(iii) Draws on the line of credit can only be made at monthly intervals pursuant to the production by Omnitech to the Financial Institution of current and verifiable accounts receivable, which shall not include provisions for returned merchandise;

(iv) Omnitech shall establish a lockbox facility with the Financial Institution to which lockbox Omnitech customers shall direct all payments;

(v) The Financial Institution shall apply similar and consistent standards to the line of credit agreement with Omnitech which it applies to similar companies under similar circumstances; and

(vi) Omnitech shall treat the guaranty provided by Clorox as Confidential information as defined in the Non-Disclosure Agreement executed by the parties hereto and incorporated herein by reference, and Omnitech shall be subject to all of the obligations relating to such Confidential Information as defined and described in such Non-Disclosure Agreement.

(vii) Omnitech agrees that the lien of credit is personal to Omnitech and shall not be available to any of its assigns or successors-in-interest.

4. In consideration of the guaranty provided by Clorox to Omnitech herein, Clorox shall receive form Omnitech a side letter, representing a corporate guaranty secured by Clorox against all assets owned by Omnitech, including current and future accounts receivable held by Omnitech, stating that Omnitech shall (i) fully pay on the line of credit no later than December 31, 1990; (ii) secure each cash draw on the line of

credit by current and verifiable accounts receivable, which shall not include provisions for returned merchandise; and (iii) use such cash draws only for working capital necessary to produce inventory and continue operations.

5. As additional consideration for the guaranty provided by Clorox to Omnitech herein, Omnitech agrees that it shall, upon establishment of the line of credit described herein, grant to Clorox an exclusive option and the right of first refusal to purchase all trademarks relating to the Doctor X product and/or to purchase the business and all of the assets of Omnitech on terms mutually-agreed to by the parties hereto, and that Clorox shall have the right to exercise this option at any time upon establishment of the line of credit through December 31, 1990. Omnitech further agrees that it shall begin to negotiate in good faith within sixty (60) days from the date of execution of this Agreement to come to mutually-agreed to terms and conditions of this option.

6. It is agreed to by the parties hereto that this Letter of Intent shall be considered confidential and, as such, no public announcements or releases shall be made without the prior written approval of both Clorox and Omnitech.

7. This Letter of Intent contains the entire agreement of the parties hereto, and supersedes all prior agreements and understandings, written and oral, with respect to the subject matter hereof, with the exception of the Non-Disclosure Agreement, as described herein and incorporated herein by reference. It may only be modified by written agreement executed by authorized representatives of the parties hereto.

If the foregoing is agreeable to you, please so indicate by signing the copy of this letter in the space provided below, and return such copy to us.

THE CLOROX COMPANY

By: /s/ A.W. Biebl

Its: /s/ Vice President

OMNITECH INTERNATIONAL, INC.

By: /s/ Fred S. Cortes

Its: /s/ President

APPENDIX C

CASH SALE

CASH SALE

BY: OMNITECH INTERNATIONAL, INC.
TO: OGDEN LABORATORIES, INC.

UNITED STATES OF AMERICA

STATE OF LOUISIANA

PARISH OF JEFFERSON

BE IT KNOWN, That on this 31st day of July in the year of our Lord one thousand nine hundred and eight-nine.

BEFORE ME, Cecil M. Burglass, Jr., a Notary Public, duly commissioned and qualified, in and for the Parish of Orleans, State of Louisiana, therein residing, and in the presence of the witnesses hereinafter named and undersigned:

PERSONALLY CAME AND APPEARED: Omnitech International, Incorporated, a corporation organized under the laws of the State of Louisiana, having its principal place of business at Thibodaux, Louisiana herein appearing by and through Robert Gohres, its Vice President, duly authorized by resolution of the Board of Directors of said corporation adopted at a meeting held on July 31, 1989, a certified copy whereof is hereunto annexed, hereinafter, whether one or more, referred to as vendor, who declares that said vendor does by these presents grant, bargain, sell, convey, transfer, assigns, set over, abandon and deliver with all legal warranties and with full substitution and subrogation in and to all the rights and actions of warranty which said vendor has or may

have against all preceding owners and vendors, unto: Ogden Laborator es, Inc., a corporation organized under the laws of the State of Louisiana and having its principal place of business in Thibodaux, Louisiana, herein appearing by and through Robert L. Gohres, its Vice President, duly authorized by resolution of the Board of Directors of said corporation adopted at a meeting held on July 31, 1989, a certified copy whereof is hereunto annexed, hereinafter, whether one or more, referred to as purchaser, here present accepting, and purchasing for purchaser, and purchaser's successors, heirs and assigns, and acknowledging due delivery and possession thereof, all and [illegible] the following described property, to wit:

The entire Dr. X product line, including, but not limited to all roach sprays and other insecticides, whether such product line is presently existing or is developed in the future.

To have and to hold the above described property unto the said purchaser, and purchaser's successors, heirs and assigns forever.

This sale is made and accepted for and in consideration of the price and sum of Five Hundred Thirty Nine Thousand ($539,000.00) Dollars, Cash, which the said purchaser has well and truly paid, in ready and current money to the said vendor, who hereby acknowledges receipt thereof and grants full acquittance and discharge therefor. Vendor and purchaser hereto further agree that vendor shall retain the exclusive rights to be the sole manufacturer and distributor of the entire Dr. X product line, including, but not limited to, all roach sprays and other insecticides, whether such product line is presently

existing or is developed in the future. Vendor and purchaser hereto further agree that vendor shall pay unto purchaser per can of any and all Dr. X product lines, including, but not limited to, all roach sprays or other insecticides, whether such product line is presently existing or is developed in the future and agree that said payments are hereby fixed at a minimum of no less than $6,000.00 per month. In the event that Omnitech International, Inc. becomes insolvent or files for protection under the bankruptcy laws of the United States or in the event of non-payment of the above referred sums, then thirty days from the date of any such filing of the bankruptcy on the part of Omnitech International, Inc. or thirty days after notice by Ogden Laboratories, Inc. of noncompliance with any terms of this contract by Omnitech International, Inc. then all manufacturing, marketing and distribution rights become the property of Ogden Laboratories, Inc.

The parties hereto take notice of the fact that the undersigned Notary Public has offered no opinion as to any encumbrances existing on the aforesaid property, nor any opinion concerning the merchantability of title to said property and agree to hold the undersigned Notary Public harmless in connection with any liability arising therewith.

THUS DONE AND PASSED, in my office in Jefferson Parish on the day, month and year herein first above written, in the presence of STEPHEN CAMERON and MICHAEL BAIN, competent witnesses, who hereunto sign their names with the said appearers and me, Notary, after reading of the whole.

WITNESSES:

/s/ Stephen Cameron

/s/ Michael Bain

OMNITECH INTERNATIONAL, INC.

/s/ Robert J. Gohres
BY: Robert J. Gohres,
Vice-President

OGDEN LABORATORIES, INC.

BY: /s/ Illegible

/s/ Cecil M. Burglass, Jr.
CECIL M. BURGLASS, JR.,
NOTARY PUBLIC